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No. 88-1457

In the Supreme Court of the United States

OCTOBER TERM, 1988

BOBBY N. OWENS,
Petitioner,

vs.

TEXACO INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent, Texaco Inc. ("Texaco"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari in this matter.

STATEMENT OF THE CASE

This case arises out of the layoff of the Petitioner Bobby N. Owens from his employment at Texaco on April 4, 1983. The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported at 857 F.2d 262 and is set forth at pages 24a-41a of the Appendix to the Petition. That opinion contains a concise and accurate summary of the relevant facts.

Bobby N. Owens, who is black, was originally employed in 1977 by a subsidiary of Texaco at its Port Neches Chemical Plant. On August 18, 1980, he entered a craft training program as a "Carpenter Trainee" in the "Ap-

prenticeship Classification," and joined the unit represented by the International Association of Machinists ("IAM"). The 1980 craft training program was the fourth such program instituted at the Neches Chemical Plant since 1970. These programs trained employees in six different craft classifications, who were represented by three different unions: the IAM which represented carpenters (including Mr. Owens), machinists and boilermakers; the Pipefitters' Union ("Pipefitters") which represented pipefitters and welders; and the International Brotherhood of Electrical Workers ("IBEW") which represented instrumentmen and electricians.

With respect to each of these unions, there existed a master labor agreement which provided that craft classification seniority would not commence until the employee was permanently assigned to a classification (i.e., the employee had completed the craft training program). In some but not all cases, Texaco had entered into separate agreements with each of the three unions providing that an employee in a craft training program could obtain seniority retroactive to the date he entered the program. Thus, for example, with respect to the three training classes prior to 1980, the IAM and Texaco had agreed to give trainees represented by the IAM retroactive seniority. Similarly, the Pipefitters had agreed with Texaco to grant retroactive classification seniority to its craft trainees. The IBEW, on the other hand, had never made this kind of agreement.

At the commencement of the 1980 training program, Texaco entered into discussions with the IAM and the Pipefitters regarding retroactive seniority. The IBEW did not seek retroactive classification. Texaco proposed that retroactive classification seniority be granted to craft trainees but only if they actually completed the training

program within thirty months. Texaco and the Pipefitters eventually reached agreement on this issue; however, in discussions between September 1980 and January 1981, the IAM refused to accept the 30-month limitation and no agreement was ever reached regarding retroactive seniority. As a result of this bargaining deadlock, IAM employees in the 1980 training program were governed by the master labor agreement which provided that their seniority would not begin to accumulate until they were permanently assigned to the classification at the end of the training program.

On or about February 1, 1983, Texaco issued a 60-day notice of layoff. At that time, Mr. Owens was still in the process of completing the craft training program. Because he was not eligible for retroactive seniority credit, Mr. Owens had less classification seniority than other carpenters in the plant, including an experienced (white) carpenter, R.L. Simon, who had been hired in 1981, after Mr. Owens had entered the training program.

One week after the 60-day notice of layoff, the IAM resurrected the issue of retroactive classification seniority and requested that it be awarded to its trainees. Because Mr. Owens was about to complete the craft training program, the grant of retroactive seniority would have placed him ahead of Mr. Simon, the white carpenter hired in 1981.

The IAM's request for retroactive seniority was discussed among three Texaco plant officials as well as Texaco's in-house labor attorney, Mr. David Sheil. Neither the IAM's request nor the discussions regarding the request addressed the issue as to the specific employees who would be affected by the grant of retroactive seniority.

Mr. Sheil advised against Texaco's agreeing to any change in the seniority provisions of the existing labor agreement after a layoff had been announced. He believed that it would be less risk to Texaco to follow the existing labor agreement rather than adjust seniority by entering into a separate agreement after the pending layoff had been announced. Based upon Mr. Sheil's legal advice, Mr. Howard Girouard, the Employee Relations Manager for the plant, made the final decision to reject the IAM's proposal. Thus, on April 4, 1983, Mr. Owens, as well as one white IAM employee who had completed the 1980 craft training program, were laid off pursuant to the terms of the seniority provisions contained in the master labor agreement.

The IAM then filed a grievance on behalf of its trainees pursuant to the master labor agreement. After a hearing, the arbitrator found that the trainees had no right to retroactive seniority, that Texaco had properly acted pursuant to the master labor agreement, and that there was no evidence that Owens was denied seniority because of his race.

Mr. Owens also filed a charge of discrimination with the EEOC on March 28, 1983. The EEOC found no reasonable cause to believe that Owens' allegations were true and dismissed his charge, issuing a Notice of Right to Sue letter on August 17, 1983.

Owens then filed the instant suit. Following a bench trial, District Judge Joe Fisher entered a decision finding that Texaco had "obviously discriminat[ed]" against Mr. Owens by refusing him his *right* to retroactive seniority. On appeal, the Fifth Circuit, in an opinion authored by Chief Judge Charles Clark, ruled that there was no evidence in the record to support the district court's findings and that the findings were clearly erroneous. Owens then timely filed his Petition for Certiorari to this Court.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT THE ISSUE UPON WHICH PETITIONER URGES THE GRANTING OF A WRIT.

Petitioner asserts that a writ should be granted in this case to address the issue of the impact of a finding that a proffered explanation by an employer is not credible on the ultimate finding of discrimination in a Title VII case. In so doing, petitioner essentially requests this Court for an advisory opinion. This case was not resolved on a credibility determination and the issue upon which the writ is sought is not presented here.

As the Court of Appeals made clear in the opening paragraph of its opinion, the judgment of the district court was reversed because the findings upon which it was based were clearly erroneous. The Court of Appeals found that three principal findings of the district court allegedly supporting its judgment were contrary to the evidence and could not support the district court's conclusory finding that Texaco's conduct in this case was "obviously discriminatory."

The Court of Appeals held that there was no basis in the record to support the district court's finding that Owens was entitled to retroactive seniority under the master labor agreement. The record in this case reflects that in the absence of a specific agreement modifying the master labor agreement and granting retroactive seniority to craft trainees, those trainees had no right to retroactive seniority under the terms of the collective bargaining agreement. The arbitrator found that there existed no right to retroactive seniority and the Court of Appeals correctly held that the district court erred

in completely disregarding the arbitration award and finding some otherwise non-existent right.

The Court of Appeals likewise correctly found that the district court erred in finding that there existed a "past practice" of Texaco's granting retroactive seniority to trainees. The evidence in the record reflects that retroactive seniority had previously been granted craft trainees only in separately negotiated agreements between the individual unions and Texaco. Nothing in the record reflects that retroactive seniority was ever given to any trainee in the absence of a contract to that effect. Indeed, Texaco and the IBEW had never agreed to retroactive craft classification seniority. With respect to the 1980 craft training program, the record reflects that Texaco and the IAM had been unable to reach any agreement regarding retroactive seniority. There being no evidence that Texaco had a retroactive seniority policy outside the separate, negotiated contracts, the Court of Appeals correctly held that the district court's reliance upon a "past practice" to support a finding of discrimination was clearly erroneous.

Finally, the Court of Appeals held that the district court's summary conclusion that Texaco's reasons for refusing to agree to retroactive seniority were not legitimate was clearly erroneous. At trial, Texaco's in-house labor attorney, David Sheil, testified that he advised plant representatives that retroactive seniority should not be granted because changing the seniority list after a layoff had been announced would create a greater risk of ultimate liability than not changing it. He further testified that at the time he gave this legal advice, he was unaware of the race of any particular employee who would be affected by his recommendation.

Contrary to petitioner's argument, the district court did *not* find that Sheil's testimony was unworthy of belief. Indeed, the district court expressly found that Sheil had in fact given such advice and that Texaco had relied upon it in making its decision. *See* Findings of Fact No. X; Conclusions of Law Nos. VI, IX. At no time did the district court challenge the veracity of Sheil's testimony; rather, the district court merely stated that it did not agree with the soundness of that legal advice and, on that basis alone, found Texaco's reliance upon such advice to be pretextual.

It is well settled that a trier of fact in a Title VII action should not "second guess" an employer's business judgment. "Title VII and Section 1981 do not protect against unfair business decisions - only against decisions motivated by unlawful animus." *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1257 (5th Cir. 1977) overruled on other grounds in *Burdine v. Texas Dep't of Community Affairs*, 647 F.2d 513, 514 (5th Cir. 1981). As the Eleventh Circuit observed in *Nix v. WLCY Radio/ Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984):

> "While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve." *Loeb v. Textron, Inc.*, 1 Cir. 1979, 600 F.2d 1003, 1012 n.6. Although WLCY's decision to fire Nix, and its refusal to reconsider that decision, might seem unfair or even "incredible" to outside observers, Nix cannot prevail in his Title VII

action for he has not established discriminatory intent.

As the Fifth Circuit has previously noted: "We do not sit to revise employment decisions taken hastily or for insufficient reasons, only those taken for illegal ones." *McPherson v. Texas Dep't of Water Resources*, 734 F.2d 1103, 1105 (5th Cir. 1984).

The Court of Appeals in this case correctly held that the district judge's mere disagreement with the legal advice provided by Texaco's in-house counsel did not support a finding of pretext pursuant to Title VII. Moreover, whether that legal advice was sound or not, there was no finding that the ER Manager, Mr. Girouard, was not credible in his testimony that he relied on that legal advice in rejecting the IAM's request to resurrect the retroactive seniority issue. Accordingly, the Court correctly held that the district court's finding of pretext was clearly erroneous.

Petitioner relies upon various alleged conflicts among the circuits regarding the role of credibility determinations in Title VII actions as support for granting the writ in this case. None of these alleged conflicts, however, are presented in this case. As is set forth above, this case does not involve a disagreement about the significance of a credibility determination in a Title VII case, nor does it raise the issue of what inference should be drawn where the trier of fact finds the employer's proffered explanation unworthy of belief. *Compare* Petition at 15-17, 20-25. The district judge never indicated that he disbelieved Mr. Sheil; he simply disagreed with Mr. Sheil's legal advice. More importantly, the record is barren of any evidence that the trial court disbelieved Mr. Girouard, the ER Manager who was admittedly the

person who made the final decision to reject the IAM's request for retroactive seniority.

Additionally, this case does not present the issue of how much additional evidence, if any, a plaintiff should be required to produce if his prima facie case is rebutted. *Compare* Petition at 17-20. Once a defendant offers evidence of the reason for an employment decision, the prima facie presumption of discrimination drops from the case. *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (1983). The district court has before it all the evidence needed to decide the ultimate factual issue of whether the defendant intentionally discriminated against plaintiff. *Id.* Here, the decision of the Court of Appeals did not turn on the issue of the impact of Owens' prima facie evidence; to the contrary, looking at all of the evidence, the Court of Appeals found that the lower court's ultimate finding of discrimination was wholly unsupported by the record.

Petitioner urges that this case presents the same issue as that raised in *Harbison-Walker v. Brieck,* 109 S.Ct. 454 (1988). That is not so. The issue in *Harbison-Walker* was whether a plaintiff *could survive summary judgment* by raising an issue of fact as to the authenticity of an employer's business judgment without presenting any direct or indirect evidence that such judgment was motivated by an intent to discriminate. *See* Petition for a Writ of Certiorari in *Harbison-Walker v. Brieck* (No. 87-271, filed August 17, 1987). *Harbison-Walker* addressed the standard of proof necessary to obtain summary judgment under F.R.C.P. 56. This case stands in a markedly different procedural posture in that the decision here was rendered following a two-day bench trial, not upon motion for summary judgment.

The Court of Appeals correctly noted that there was no support in the record for the findings upon which the district court based its conclusion that Texaco discriminated against Mr. Owens. There being no such support, the Court of Appeals reversed the lower court's judgment and remanded with directions to enter judgment in favor of Texaco.

II. THE COURT'S FINDINGS IN THIS CASE ARE CONSISTENT WITH F.R.C.P. 52 AND PULLMAN-STANDARD v. SWINT.

Although petitioner does not urge the granting of a writ on these grounds, it is to be noted that the Court of Appeals' decision is fully consistent with the standards set forth by this Court in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). In *Swint*, this Court held:

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous . . . . This Rule does not apply to conclusions of law. . . . [W]here findings are infirm because of an erroneous view of the law, a remand is the proper course *unless the record permits only one resolution of the factual issue.*

Id. at 287, 292 (emphasis added).

In the instant case, the Court of Appeals did not make *de novo* findings of fact. To the contrary, the Court of Appeals held that the findings upon which the district court based its decision were wholly unsupported by the record. There being no other basis upon which a trier of fact could find discrimination, the Court of Appeals correctly directed the district court to enter judgment in favor of Texaco.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

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